Supreme Court, U.S.
FILED
AUG 14 1984
ALEXANDER L. STEVAS
Clerk

No. 83-2035

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

MARK ARDEN SCHMUCKER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE FOR RESPONDENT MARK ARDEN SCHMUCKER

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QUESTIONS PRESENTED

1. Whether a prosecutorial policy whose inevitable effect is to identify solely those nonregistrants who openly object to the law upon religious, moral, and/or political grounds violates the First Amendment?

2. Whether such a policy, known prior to implementation to focus disproportionately upon persons exercising First Amendment rights, and persisted in despite the expected results of prosecuting only such persons, also violates the Fifth Amendment?

3. Whether respondent was entitled to an evidentiary hearing upon his claim of unconstitutionally selective prosecution based on such facts?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. A, p. 1a-10a) is reported at 721 F.2d 1046. The order and opinion of the United States District Court for the Northern District of Ohio, Eastern Division, denying Respondent's motion to dismiss for selective prosecution (Pet. App. D p. 19a-23a) is

unreported.

JURISDICTION

The judgment of the court of appeals was issued November 25, 1983. A petition for rehearing with suggestion for rehearing en banc was denied on March 12, 1984. On May 2, 1984, Justice O'Connor extended the time for filing a petition for writ of certiorari to June 10, 1984. The petition was filed and docketed on Monday June 11, 1984. On July 6, 1984 respondent was granted an extension of time within which to file his response to the petition for a writ of certiorari to and including August 14, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 22, 1982, Respondent was indicted for failing to register with Selective Service pursuant to Presidential Proclamation No. 4771, in violation of 50 U.S.C. App. (and Supp. V) 453, 462. After pretrial motions to dismiss, to com-

pel discovery, and to hold an evidentiary hearing upon the issue of selective prosecution were overruled, respondent proceeded to jury trial on September 30, 1982 and was convicted on October 5, 1982. Respondent was sentenced under the Youth Corrections Act to three years' probation, conditioned upon serving 24 months out of state at a home for profoundly mentally retarded adults. He began serving as ordered, and served until his release in December, 1983 following the reversal and remand by the court of appeals. Respondent was fined $4,000.00 and assessed costs. Respondent was specifically not required to register:

> This Court believes that such a condition would insult what this Court believes to be an honest religious conviction on your part. (CA App. p. 12).

1. On July 2, 1980, by Presidential Proclamation 4771, all males born in 1960 and residing in the United States were ordered to register with Selective Service during the week of July 21, 1980. Respondent was born October 4,

1960 and is a citizen. He was raised as a Mennonite and was attending Goshen College, a Mennonite school. As an adherent to the philosophically pacifist Mennonite faith, respondent was religiously, morally, and politically opposed to any war-making activities, which he undisputedly sincerely believed registration with Selective Service to be. On August 10, 1980, he wrote to the Director of Selective Service, giving his name, his current and permanent address, and his age eligibility for registration. The letter explained, inter alia:

> I am writing to inform you that I have violated the Military Selective Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.
>
> I believe that war in any form is wrong . . . . As a Christian, I feel that I must avoid participation in the conscription process by not registering because conscription is an inherant (sic) part of the war process.
>
> At this point, I feel that I should emphasize that I am not anti-American. I consider myself privileged to live in a country where basic human rights,

> self-government, and religious freedom are granted to the citizens. I am not opposed to serving this great land of ours by working in a hospital, teaching, or by working at some other type of public service job . . . .

(C.A. App. p. 24; App. A infra).

2. Other persons self-reported their refusal upon religious, moral, and/or political grounds to register, and together with persons reported by others as non-registrants, were referred to Selective Service. Selective Service devised a system designed exclusively to pursue these persons and to attempt to secure compliance prior to instituting prosecution. As Edward Frankle, designer of this "passive detection system," stated under oath: "Selective Service has done nothing in these cases to attempt to determine the identities of people who have not registered." (C.A. App. p. 48). All letters objecting to registration were referred to Selective Service for action, including those which were obviously, on their face, written by ineligible

persons, be they female, too young, or too old. (C.A. App. pp. 49-50 (Frankle affidavit)). These latter were culled out.

Selective Service sent a registered certified letter to each person so identified, including respondent, stating the obligation to register, his apparent non-compliance therewith, the potential penalties therefor, and requesting registration on the enclosed form.

Those persons, including respondent, who failed to comply after receipt of this letter (as evidenced by signed receipts), were referred to the Department of Justice for further action. Respondent's name was referred on October 21, 1981 in the second group of such referrals. The Department of Justice sent a second letter seeking registration from Schmucker. Respondent again declined to register, as he did during the national grace period, unable to compromise his principles.

Pursuant to government policy, respondent's case was then referred to the local United

States Attorney and to the FBI. On June 22, 1982, an FBI agent spoke with Mr. Schmucker, who reiterated his awareness of the registration law and stood by his religiously motivated opposition to compliance. He explained the basis of his opposition, and stated he had given these reasons in the August 10, 1980 letter. He also spoke of a letter to President Reagan in which he spoke of many issues troublesome to him, including registration. He further explained "he felt that all wars were wrong, and therefore he could not support any military organization . . . . (that) if he registered with Selective Service, he would be condoning the escalation of a nuclear arms race . . . . (and that) in not registering with Selective Service, he would cause the United States Government to be delayed in mobilizing their armed forces since they would have to take some time to handle his particular case." (C.A. App. pp. 132-133 (FBI Agent-Quigley)).

Thereafter, an assistant United States

Attorney contacted respondent; his requests for compliance were met by respondent's explanation again of his principled commitment to his conscience. Convinced of respondent's sincerity, the local prosecutor contacted the Justice Department attorney responsible for supervising Selective Service prosecutions, David J. Kline, seeking "authority to decline prosecution primarily because the alleged non-registrant was a Mennonite seminary student." Kline refused. (C.A. App. p.67 (aff't Kline)). That assistant U.S. Attorney filed an affidavit stating in direct contradiction that: "The officials of the United States Department of Justice did not decide, nor did they influence the decision to present an indictment against Mark Schmucker." (C.A. App. p. 78).

Respondent testified at trial that he opposed registration because it would facilitate mobilization, permit the country to prepare for war more easily, and thus involve him in contributing to the warmaking process.

Respondent testified to his purpose in sending the letter: not simply to disagree with the law but also "at least let the Government know why I was breaking it." (C.A. App. 142).

3. Respondent's motion to dismiss for selective prosecution challenged the entire system of prosecuting, from "passive detection," up to declining prosecution if registration was secured in one of the numerous required contacts, and including the direct involvement of the Justice Department in the decision to prosecute. Respondent and every other person indicted were identified and pursued because they had exercised their First Amendment rights to petition for redress, of religious freedom, and/or to speak in opposition to government policy. No "quiet" non-registrant of the approximately half-million non-registrants could be identified for prosecution under this policy. Respondent noted the chilling effect upon the exercise of such vital First Amendment rights which inexorably flowed from this

policy.

The government has never disputed that there was a sizable pool of nonregistrants ("enormous numbers" neither "identified nor prosecuted") nor that all of the indictees shared the common feature of expressed dissent, either as self-reporters or vocal opponents. Indeed, the government recognized that all of the potential indictees would necessarily be self-reporters, or if third party referrals, have a "high probability" of being "vocal proponents of draft non-registration." (Wayte Jt. App. pp. 290-91).

The government thus recognizes that the system and policy it persisted in applying identified only expressed dissenters and pursued only those with strong convictions of opposition. In fact, the government insists that respondent and all the indictees of the passive system form a separate class which can be treated differently (not "similarly situated" to every other willful nonregistrant) because they have been identified

to the government. (Petition p. 14-15; Wayte v. United States, Brief in Response to Petition for Certiorari p. 17 fn. 14, p. 18-19.) That their identification resulted solely from their expressions of dissent is a decisive factor which the government has admitted. Identification based upon expressed dissent as the classifying factor is the very essence of content-based distinction.

4. Documents submitted to the trial court established that

a. respondent is a member of a class of nonregistrants singled out as having protested - directly or indirectly - the registration law; and

b. he was noticed and treated individually as a target for prosecution because of his known and persistent commitment to his religious beliefs.

a. As this Court is aware from the Briefs and Record submitted in David Alan Wayte v. United States of America, No. 83-1292 (cert. granted

May 29, 1984), the Department of Justice in particular was well aware long before prosecutions commenced that the design of the passive detection system would inevitably result in prosecuting religious dissenters and vocal opponents of registration. The Department recognized that an "active" system would obviate selective prosecution problems by providing "appropriate" selection criteria.

The government argues that "delay" in prosecuting in July of 1982 would harm the registration system by encouraging noncompliance. However, since necessarily only dissenters were indicted - a fact obvious to everyone including the government, the indictees, the media, the courts, and the public - the passive system obviously encouraged quiet noncompliance while blatantly discouraging expressed dissent. Even the government admitted the policy was designed to focus on the "most adamant"; i.e., principled, nonregistrants.

The government has stated to this Court that the prosecutorial policy

> had the incidental effect of identifying opponents of registration, an eventuality anticipated in Department of Justice correspondence. (Brief in Response to Petition, Wayte v. United States, p. 18)

The government has further tacitly admitted to this Court that the passive enforcement policy resulted in prosecutions "only of individuals who criticized government policy," and explicitly admitted that those indicted were identified for having "brought themselves to the attention of Selective Service, and their reasons for doing so have obviously been opposition to the draft . . ." (Wayte v. United States, Brief in Response to Petition for Certiorari, No. 83-1292, p. 15 fn. 10).

The government's knowledge of high media interest in the first nonregistrant indictments supports an expectation of a chilling effect. (See C.A. App. p. 34-35 (fn. 3)). The government either pursued dissenters intentionally, or exploited

the chilling effect of prosecuting avowed opponents of its policy.

b. Despite the commonality of the system of prosecution which singled out both Mr. Wayte and Mr. Schmucker, respondent's case differs somewhat in that his indictment was personally discussed by top level officials, and local prosecutorial discretion was specifically overriden.

First, the government categorized religious and political dissenters separately. (C.A. App. p. 33). The Mennonite dissenters were specifically noted on March 19, 1982 to constitute a large number of self-reporters. (C.A.App. p.42 et seq). The local prosecutor sought to decline prosecution of respondent because of his religious sincerity, but was refused authority by the Justice Department. (C.A. App. p. 67). Shortly after this contact, a memo stated the Department "tentatively expect(s) an indictment to be returned on July 19, 1982, in the Northern District of Ohio. The expected defendant is a

Mennonite Seminary Student." (C.A. App. p. 45).

Respondent was notable to the government because of his religious beliefs and affiliations. The Department of Justice chose to prosecute him for the symbolic impact of these facts.

5. The Sixth Circuit Court of Appeals, recognizing the First Amendment violation, reversed respondent's conviction and remanded for an evidentiary hearing.

ARGUMENT

The government suggests that this Court defer consideration of its petition until there has been a final disposition of the case of Wayte v. United States of America, No. 83-1292 (cert. granted May 29, 1984). Respondent opposes the request, which could result in a determination being reached in his case without his participation, for several reasons.

1. The Sixth Circuit's penetrating analysis of selective prosecution as a First

Amendment issue is the precise conflict upon which the government based its acquiescence in the granting of the Wayte petition. It has prompted the government to assert as fact many subsequent events in Selective Service enforcement for which there is no basis in any record. (E.g., Wayte Brief in Response to Petition pp. 7-8 fn. 4; Petition pp. 6-7 fn. 3). Consideration of this case will bring before the Court the actual ruling which the petitioner disputes, with the record supporting it, and also provide the Court with a vehicle to determine fully the question of selective prosecution, with its substantive and procedural ramifications.

Respondent submits that both the result reached by the Sixth Circuit herein, and the analysis used to base it, are correct and should be adopted by this Court. This would obviate the need to review respondent's case, as it is currently correctly decided.

2. Respondent notes that this Court

is obviously convinced of the importance of the question raised concerning selective prosecution, having already determined to hear the Wayte case. Respondent submits that a full consideration of the question accepted for review in Wayte will be enhanced by consolidating his case for consideration therewith. Then, the panoply of relevant facts will be presented to this Court with as full a record as possible. For instance, the identification and classification of religious dissenters, as well as vocal opponents, separated by the government itself when evaluating its prosecutorial policy, will be before the Court in Schmucker more fully than is possible in Wayte. Furthermore, the question of prosecutorial discretion - urged by the government as the key issue in Wayte (Brief in Response to Petition p. 12) - is brought into focus more sharply by the refusal to permit the local prosecutor to exercise such discretion in Schmucker.

3. The government agrees that the

same issue is raised by both cases (and numerous others), in all of which individual records have been compiled. This Court should benefit from the litigation already conducted to assure itself of the most comprehensive presentation and thorough understanding of the question involved. Since it is a system which is being challenged, the opportunity to see that system at work in as many circumstances as possible should enhance the Court's information and ultimate deliberation and decision by providing a more complete picture. Nuances and patterns will be more readily discernible.

As the petitioner challenges the Sixth Circuit's ruling in each case pending in this Court, respondent will now briefly address its major arguments against that ruling.

A. The petitioner insists that direct proof of subjective bad faith motive - "retaliation" "retribution" - must be demonstrated to establish that a prosecutorial policy identify-

ing only those who have exercised First Amendment rights is unconstitutional. The government contends that admissions of its own bad faith will alone suffice to meet this "smoking gun" requirement. The reason advanced to support this radical limitation of acceptable proof is judicial deference to executive "discretion."

This Court's opinions touching upon selective prosecution have never required admissions of evil motive, but use the word "deliberate" to describe impermissible selectivity. E.g., Oyler v. Boles, 368 U.S. 448, 456 (1962). The seminal case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), accepted as proof of discriminatory intent the disproportionate effect upon a clear racial category. No soul-searching of governmental motive looking for an announcement of an evil purpose to create this de facto discrimination was undertaken or required.

The petitioner seeks to double the burden upon respondent, to show not only class-

ification based upon First Amendment exercise, but also to prove an evil motive in making the classification. As recognized by the Sixth Circuit, the Constitution is offended by the practice and result, and further probing is unnecessary. This system imposes an unacceptable classification, as with Yick Wo, supra.

The petitioner urges prosecutorial discretion as the rubric under which this Court should require direct proof of illicit motive. However, probing the psychological sources of the decision-making process is an even more dangerous intrusion into such discretion than the application of a more objective test of intent and inevitable result. Since this Court is the shield against unconstitutional results, it can control such effects without unduly impinging any executive decision-making process by applying the time-honored standard of intent. As in cases of criminal intent, motive need not control when deliberation and unacceptable result coincide. Inevitable results

may "ripen into proof" of discriminatory purpose. Personnel Administrator v. Feeney, 442 U.S. 256, 279 fn. 25 (1979). The petitioner concedes that its discretion must be limited by constitutional bounds. Cf. Cohen v. California, 403 U.S. 15(1971) (recognizing the context of a prosecution supports an inference of content-based distinction). Adherence to a policy with knowledge of its predictable effects, much less one with inevitable predicted effects. may prove the ultimate fact of forbidden purpose in equal protection cases. Columbus Board of Education v. Penick, 443 U.S. 449, 465 (1979).

B. "Invidious" purpose, if required, can be proven by indirect evidence. United States v. Falk, 479 F.2d 618, 624 (7th Cir. 1973) (en banc), noted that prosecuting only those who failed to acquiesce in government demands to compromise their previously communicated principles was indicative of legally improper motive. The facts herein do not differ. There is no basis for refusing to apply evidentiary prin-

ciples of inferences drawn from conduct and/or results. Direct evidence is not alone synonymous with proof, as this Court has also recognized in equal protection cases.

C. The Sixth Circuit uses "vocal" to describe one who expresses his ideas. Expressing disagreement directly to the government - petitioning for redress - surely is entitled to protection along with public speech. The Sixth Circuit recognized the scope of the First Amendment, which petitioner still fails to perceive.

D. Petitioner finds itself in a quagmire with the deterrent implications of the "passive" prosecutions. First petitioner argues that respondent's acts did nothing to discourage others from registering (Petition p. 15), but then claims that delaying the passive late July indictments when the active system allegedly went into operation in June would discourage registration. (Petition p. 7, 8, 9) It is logically insupportable then not to wait for implementation of

the active system, since the passive indictees did not threaten registration per se, unless registration was deemed to be encouraged by prosecutions of principled dissenters. To encourage registration, the passive prosecutions would necessarily chill, if not stifle, dissent.

E. The government herein claims a lack of guidance from the court of appeals upon the procedural issues of entitlement to hearing and requisite proofs to sustain or defeat the selective prosecution claim (Petition pp. 10-11, 16). However, the government evinced no such difficulty in Wayte, asserting that the standard established by the Sixth Circuit "essentially forecloses the possibility that the district court will rule for the government after an evidentiary hearing." (Wayte v. United States, Brief in Response to Petition for Certiorari, No. 83-1292 p. 15 fn. 10).

The government asserts the Sixth Circuit "said little about the requisite threshold

showing." (Petition p. 16). The Court stated:

> A defendant is entitled to an evidentiary hearing if he makes a preliminary showing that there is a legitimate issue concerning the government's conduct under this (United States v. Hazel, 696 F.2d 473, 474 (6th Cir. 1983)) standard;

A legitimate issue is raised by showing a policy resulting in prosecutions only of those who express their conscientious refusal. (Pet. App. A p. 3a). The government further complains there was "no guidance" about the evidence respondent could not discover and adduce or the government present. (Petition p. 16). The Court said evidence that the policy targeted "only young men who made confessions through their criticisms . . . " would be important (Pet. App. A. p. 7A) but also noted the government had the burden to produce non-discriminatory evidence and respondent could reply on punishment and chilling effect grounds. (Pet. App. A. p. 9a).

Finally, the government misstates the

holding of the Sixth Circuit as "the government may not prosecute those who criticize government policy while confessing their failure to register." (Petition p. 16), apparently to avoid the real issue presented by their policy. The Court repeatedly emphasized that the government could not prosecute only those who critize government policy. (Pet. App. A. pp. 2a, 3a, 4a, 5a, 6a, 7a).

F. The Sixth Circuit has provided the proper framework of analysis, and reached the correct result herein. First Amendment rights are necessarily burdened by the system and policy single-mindedly pursued by petitioner despite obvious drawbacks in its content-based, discriminatory selectivity. The expected creation of a recognized class of persons who spoke out either to the government or publicly as the only ones even possibly identified by such system is a violation of the Fifth Amendment as well, for classification is based upon the exercise of constitutional rights. The allegations, backed by proofs including govern-

mental documents, entitle respondent to an evidentiary hearing.

CONCLUSION

This Court should either deny certiorari and remand respondent for hearing pursuant to the law and standards set forth in the court of appeals' opinion and judgment below; or, if jurisdiction is to be exercised, consolidate this cause on the merits with Wayte v. United States, No. 83-1292 (cert. granted May 29, 1984).

Respectfully submitted,

ELIZABETH REILLY
WILLIAM T. WHITAKER
JOHN LAWSON
DALE A. BAICH

Dated: August 14, 1984

August 10, 1980

To whom it may concern:

I am writing to inform you that I have violated the Military Selectice Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.

I believe that war in any form is wrong. Christ meant for Christians to love each other and to love their enemies. War is an expression of hatred and an institution that has legalized and encouraged types of violent conduct that no civilized country would allow within its borders during peacetime. The use of force to resolve disputes has created an atmosphere of coercion which directly conflicts with the message of love preached by Christ. A Christian must use truth, love, understanding, and equality to resolve any disputes in which he is involved. As a Christian,

I feel that I must avoid participation in the conscription process by not registering because conscription is an inherent part of the war process.

At this point, I feel that I should emphasize that I am not anti-American. I consider myself privileged to live in a country where basic human rights, self-government, and religious freedom are granted to the citizens. I am not opposed to serving this great land of ours by working in a hospital, teaching, or by working at some other type of public service job. However, I can not participate, in any manner, with the armed forces.

Sincerely,

Mark Schmucker